Health Service System City & County of San Francisco

Surrogacy White Paper

Overview

Surrogacy is defined by Merriam Webster as “the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children”. There are generally two types of surrogacy which is dependent on the source of genetic material—provided by either the surrogate mother or the intended parent(s). Surrogacy allows intended parent(s) who are otherwise incapable of having a child and wish to have the genetic linkage that is not provided via adoption. There are strong arguments both for and against the practice of surrogacy.

The purpose of this summary is to review the possibility of the Health Service System of the City and County of San Francisco (HSS) offering a surrogacy benefit to its employees.

Market Data

At this time, surrogacy coverage by an employer is very rare but an area of, slowly, growing interest. HSS’s current carriers (UnitedHealthcare, Blue Shield of California and Kaiser) do not currently have surrogacy coverage and have no plans to include in the future. The first companies to implement such a benefit were primarily in the tech field who wanted to provide a way for employees to build a career and a family at the same time. The most notable company to first offer surrogacy coverage was Facebook which began offering a surrogacy benefit of $20,000 in 2014. The coverage includes the cost of surrogacy, legal fees and egg freezing. Apple followed suit in 2015 with a $20,000 benefit which is included as part of their adoption benefit.

Other organizations covering surrogacy include Columbia University with a $30,000 benefit and T-Mobile which provides a per child benefit of $13,400.

Plan Design Considerations

Most employers provide a lifetime dollar limit for surrogacy services such as $20,000. The benefit is available to any employee: males/females, singles/couples, same-sex partners or opposite-sex partners. The benefit is not excludable from taxable income under IRS rules and may be subject to State, Federal, Social Security, Medicare and federal unemployment taxes at time of payment. Further, this plan is not an eligible IRS Section 125 expense and may not be offered through the Trust. A separate funding mechanism will need to be identified.

Typical covered expenses include but are not limited to:

- Surrogacy agency service fee
- Compensation to the surrogate
- Medical claims of or insurance for the surrogate associated with the pregnancy and delivery
- Medical screenings (including counseling)
- Legal fees

Non-reimbursable expenses include, but are not limited to:

- Medical expenses associated with the fertility status of the surrogate

- Voluntary contributions such as donations
- Guardianship or custody costs that are not associated with the legal surrogacy of the child
- Expenses incurred prior to employee's date of hire
- Charges that are in violation of federal or state law
- Non-medical related expenses such as transportation to doctor's appointments, special food or over-the-counter supplements, maternity clothing
- Loss of income due to complications of pregnancy such as bed rest

Note: costs associated with the fertility status of the intended parent(s) may be covered by HSS' infertility benefit.

Cost

Typical surrogacy costs range from $50,000 to $150,000. Any cost associated with this type of benefit would be funded by HSS. Further, HSS would need to administer the program in-house as there are no vendors who currently manage a self-funded surrogacy benefit. Lloyds of London does appear to have an insurance policy but details are not readily available and it appears to be an employee pay only plan. HSS's medical insurers would not cover the claims of the surrogate as the surrogate is not a tax dependent of the employee and precluded from participating in the group health plan.

HSS will need to develop a policy outlining the eligibility, eligible expenses, payment process and appeal process.

Legal and Tax Considerations

- Surrogacy costs are expressly excluded from the definition of qualified adoption expenses and should be expressly excluded from the terms of any adoption assistance plan;
- The benefit should be added outside the group medical plan and the group medical plan documents should be revised to make it explicit that a covered participant's surrogate is not eligible for any benefits under the plan;
- The surrogacy benefit description should include a lifetime maximum benefit and a list of inclusions and exclusions (e.g., will the benefit just reimburse legal expenses or also certain medical expenses related to the procedure or the pregnancy and delivery?);
- HSS and/or the participating employers should consider revising leave policies to make clear which, if any, paid leave benefits will be extended to the employee becoming a parent via surrogacy; and
- Surrogacy is not legal in all states.

California has been very favorable to surrogacy as noted in the cases of Calvert v. Johnson (1993) and Buzzanca v. Buzzanca (1998). Through these cases, California established and reinforced that intent governs in the determination of parentage in gestational surrogacy situations.

Note—Aon is not a law or tax firm and therefore cannot provide legal or tax advice. It is suggested that HSS obtain legal advice from the HSS legal counsel.